IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.04.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.R.C.No.1174 of 2003

Balasubbaraj ..Petitioner/Accused

vs.

R.Narayanan ..Respondent/Complainant

Prayer: This Appeal has been preferred against the judgment dated 23.07.2003 made in C.A.No.20 of 2001 passed by the I Additional Sessions Judge, Dharmapuri at Krishnagiri, confirming the judgment in C.C.No.125 of 2000 on the file of the Judicial Magistrate No.II, Hosur, dated 11.05.2001.

For Petitioner : Mr.V.Raghavachari

For Respondent : Mr.V.Sivakumar

ORDER

This appeal has been preferred against the judgment in C.A.No.20 of 2001 on the file of the I Additional Sessions Judge, Dharmapuri.

2. A private complaint was preferred by the complainant before the learned Judicial Magistrate No.II, Hosur, under Section 200 of Cr.P.C., for an offence under Section 138 of the Negotiable Instruments Act . After taking the cognizance and after recording the sworn statement of the complainant the learned Judicial Magistrate has taken the complaint on file as C.C.No.125 of 2000 and on appearance of the accused on summon copies under Section 207 of Cr.P.C., were furnished to the accused. When the offence was explained to the accused and when questioned, the accused pleaded not guilty. Before the trial Court P.W.1 and P.W.2 were examined and Ex.P.1 to Ex.P.12 were marked.

3. According to P.W.1, he is having a firm by name Energy Savers Marketing in which the accused is also a partner. On 31.1.1999 he got himself relieved from the partnership and on 1.4.1999 he has executed a deed of retirement. A memorandum of understanding (Ex.P.1) was entered into between him and the accused. As per the memorandum of understanding Ex.P.1, the

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accused owes Rs.4,00,000/- to him and to discharge the said liability the accused had drawn four cheques each for Rs.1,00,000/- and that the amount due under two cheques each for Rs.1,00,000/- was paid by the accused direct and when the 3rd cheque for Rs.1,00,000/- was presented in the Bharath Overseas Bank in which the complainant is having his account, the same was returned by the bank on 31.1.2000 on the ground of 'payment stopped'. Ex.P.2 is the said dishonoured cheque which was accompanied by Ex.P.3-bank memo. When the cheque was presented in the same bank on 10th of April 2000 once again it was returned for the same reason. Ex.P.4 is the returned memo. When the cheque dated 15.4.2000 for Rs.1,00,000/- was presented in the State Bank of Mysore, Hosur Branch, the same was returned with an endorsement 'there is no sufficient funds'. Ex.P.6 is the return memo. The dishonoured cheque is Ex.P.5. P.W.1 has issued lawyer's notice on 16.4.2000 to the accused as contemplated under Section 138 (b) of the Negotiable Instruments Act under the original of Ex.P.7, which was acknowledged by the accused under Ex.P.8. Ex.P.9 is the reply notice dated 22.4.2000 containing the false averments.

4. P.W.2 is the Assistant Manager of the State Bank of Mysore, Hosur Branch, in which the accused is having cash credit loan account. The complainant is also having SB account in the same branch. He would depose that Ex.P.2-cheque was presented in his bank 's branch on 29.1.2000 and on the said date a sum of Rs.1,18,968/75 was the amount in credit in the account of the accused and Ex.P.10 is the ledger extract for the account of the accused. Ex.P.11 is the letter of requisition given by the accused for stoppage of payment. Ex.P.12 is the cheque returned register maintained by the said bank. On the date of return of the cheque a sum of Rs.1,16,913/77 was in the credit of the account of the accused.

5. When incriminating circumstances were put to the accused under Section 313 of Cr.P.C., the accused would deny his complicity with the crime. After going through the oral and documentary evidence analytically the learned trial judge has come to the conclusion that the offence under Section 138 of the Negotiable Instruments Act has been attracted against the accused and accordingly has convicted the accused under Section 138 of the Negotiable Instruments Act and sentenced to undergo four months SI and slapped a fine of Rs.5000/- with default sentence. Against the findings of the learned trial judge, the accused has preferred an appeal in C.A.No.20 of 2001 before the I Additional Sessions judge, Dharmapuri at Krishnagiri. After due deliberation to the submissions made by the both sides and after scrutinizing the evidence available on record and after going through the judgment of the trial court, the first appellate judge has ultimately concurred with the findings of the learned trial judge thereby

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dismissing the appeal, which necessitated the accused to prefer this revision.

6. Now the point for determination in this revision is whether the findings of the learned first appellate Court in C.A.No.20 of 2001 on the file of the I Additional Sessions Judge, Dharmapuri at Krishnagiri is liable to be set aside for the reasons stated in the memorandum of revision?

7. The Point:-

7(a) The learned counsel for the revision petitioner would contend that Ex.P.2-cheque was returned with an endorsement 'payment stopped' and Ex.P.5-cheque was returned by the bank on the ground that no sufficient funds and that the above said cheques were given only as a security for the amount due to the complainant under a business transaction. But it is the case of the complainant that the partnership firm in which the accused and the complainant were partners got dissolved on 31.3.1999 and accordingly a memorandum of understanding was entered into between the accused and the complainant on 1.4.1999 and as per Ex.P.1, memorandum of understanding, the amount due to the complainant from the accused comes to Rs.4,00,000/- and to discharge the above said liability of Rs.4,00,000/- the accused had drawn four cheques each for Rs.1,00,000/-, but subsequently he had paid the amount of Rs.2,00,000/- covered under two cheques and when 3rd and 4th cheque viz. Ex.P.2 and Ex.P.5 were presented in the bank they were dishonoured for the reason indicated above. So the contention of the learned counsel for the revision petitioner that Ex.P.2 and Ex.P.5 cheques were drawn by the accused infavour of the complainant and handed over only as a security cannot be sustained.

7(b) Another vain attempt was made by the learned counsel for the revision petitioner by saying that Ex.P.2-cheque was returned on the ground of stoppage of payment only and since there was no sufficient fund in his account he only advised the bank not to honour the cheque which act will not attract an offence under Section 138 of the Negotiable Instruments Act. But this contention of the learned counsel for the revision petitioner cannot be upheld because it is clear from the evidence of P.W.2, the Assistant Manager of State Bank of Mysore, Hosur branch, wherein the accused is having his account and both the complainant and the accused are having cash credit loan account would depose that on the date of drawal of Ex.P.2-cheque, a sum of Rs.1,18,968/75 was the balance in credit in the account of the accused. In support of this, P.W.2 has also produced Ex.P.10 ledger extract relating to the account of the accused. P.W.2 would further depose that even on the date of return of Ex.P.2-cheque the accused was having a balance of Rs.1,16,913/77 to the

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credit of his account. So on the date of drawal of the cheque, the accused was having more than the amount mentioned in the cheque which is sufficient for honouring of the same. There is absolutely no acceptable reasoning given in the reply notice issued by the accused under Ex.P.9 for advising the bank to stop payment under Ex.P.2-cheque. Under such circumstances, I am of the view that the advise to the bank under Ex.P.11 to 'stop payment' for Ex.P.2 will in no way absolve the statutory liability cast upon the accused under section 138 of the Negotiable Instruments Act. Under such circumstances, I do not find any reason to interfere with the findings of the first appellate Court as well as the trial Court in arriving at the conclusion that the accused is liable to be punished under Section 138 of the Negotiable Instruments Act.

7(c) When coming to the question of sentence it is note worthy to mention the ratio decidendi of the Honourable Apex Court in 2004(2) SCC 235 (Goa Plast (P) Ltd., Vs. Chico Ursula D'souza), wherein it has been observed as follows:-

> "It has to be presumed that a cheque is issued in discharge of any debt or other liability. The presumption can be rebutted by adducing evidence and the burden of proof is on the person who wants to rebut the presumption. This presumption coupled with the object of Chapter XVII of the Act which is to promote the efficacy of banking operation and to ensure credibility in business transactions through banks persuades us to take a view that by countermanding payment of post-dated cheque, a party should not be allowed to get away from the penal provision of Section 138 of the Act. A contrary view would render Section 138 a dead letter and will provide a handle to persons trying to avoid payment under legal obligations undertaken by them through their own acts which in other words can be said to be taking advantage of one's own wrong. If we hold otherwise, by giving instructions to banks to stop payment of a cheque after issuing the same against a debt or liability, a drawer will easily avoid penal consequences under Section 138. Once a cheque is issued by a drawer, a presumption under Section 139 must follow and merely because the drawer issued notice to the drawee or to the bank for stoppage of payment it will not preclude an action under Section 138 of the Act by the drawee or the holder of the cheque in due course. This was the view taken by this Court in *Modi Cements Ltd. Vs. Kunchil Kumar Nandi (1998) 3 SCC 249.* On same facts is the decision of this Court in *Ashok Yeshwant Badave Vs.*

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Surendra Madhavrao Nighojakar (2001)3 SCC 726. The decision in *Modi case* overruled an earlier decision of this Court in *Electronics Trade & Technology Development Corpn. Ltd Vs. Indian Technologists & Enginoors (Electronics) (P) Ltd. (1996) 2 SCC 739 : 1996 SCC (Cri) 454,* which had taken a contrary view. We are in respectful agreement with the view taken in *Modi case.* The said view is in consonance with the object of the legislation. On the faith of payment by way of a post-dated cheque, the payee alters his position by accepting the cheque. If stoppage of payment before the due date of the cheque is allowed to take the transaction out of the purview of Section 138 of the Act, it will shake the confidence which a cheque is otherwise intended to inspire regarding payment being available on the due date.

.... We have no doubt that the respondent has committed an offence punishable under the provisions of Section 138 of the Act and is liable to be punished. The transaction in question took place between the parties in the year 1993, therefore, Section 138, as it stood at the relevant time, would be applicable to the present case. Section 138 provides imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both. Section 138 has now been amended and the penalty of imprisonment for a term which may extend to one year has been substituted by two years as provided by the amending Act of 2002 and the fine which may extend to twice the amount of the cheque. This has been prescribed as the punishment for the offence under Section 138 of the Act.

The object and the ingredients under the provisions, in particular, Section 138 and 139 of the Act cannot be ignored. Proper and smooth functioning of all business transactions, particularly, of cheques as instruments, primarily depends upon the integrity and honesty of the parties. In our country, in a large number of commercial transactions, it was noted that the cheques were issued even merely as a device not only to stall but even to defraud the creditors. The sanctity and credibility of issuance of cheques in commercial transactions was eroded to a large extent. Undoubtedly, dishonour of a cheque by the bank causes incalculable loss, injury and inconvenience to the payee and the entire credibility of the business

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transactions within and outside the country suffers a serious setback. Parliament, in order to restore the credibility of cheques as a trustworthy substitute for cash payment enacted the aforsaid provisions. The remedy available in a civil court is a long-drawn matter and an unscrupulous drawer normally takes various pleas to defeat the genuine claim of the payee."

After taking such a view in the above said dictum, the Honourable Apex Court have convicted the accused and directed the accused to pay compensation of Rs.80,000/- (twice the amount of the cheque to the complainant with default sentence. I am of the view that we can apply the same yardstick laid down by the Honourable Apex Court in the case on hand also. Point is answered accordingly.

8. In fine, the revision is dismissed but with the following modification in the sentence alone. The accused is convicted under Section 138 of the Negotiable Instruments Act and directed to pay a compensation of Rs.4,00,000/- (twice the amount of the cheques) to the complainant in default to undergo four months SI, instead four months SI and fine of Rs.5,000/- with default sentence awarded by the first appellate Court in C.A.No.20 of 2001 on the file of the I Additional Sessions Judge, Dharmapui at Krishnagiri. Time for payment of the compensation amount is three months from today.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

ssv

To

1. The Judicial Magistrate No.II, Hosur.

2.-do- Thro'The Chief Judicial Magistrate,
Dharmapuri at Krishnagiri.

3.The I Addl. Sessions Judge,
Dharmapuri at Krishnagiri.

4.-do- thro'The Principal Sessions Judge,
Dharmapuri at Krishnagiri.

+1cc to Mr.V.Raghavachari, Advocate Sr 25824

NG (CO)
km/25.4. Crl.R.C.No.1174 of 2003

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